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No. 01-885

# Supreme Court of the United States

ANTHONY KEITH JOHNSON,

*Petitioner,*

v.

JOHN E. NAGLE, WARDEN, AND
THE ATTORNEY GENERAL OF THE STATE OF ALABAMA

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## REPLY BRIEF FOR PETITIONER

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# REPLY BRIEF FOR PETITIONER

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The petition established that this death penalty case presents four substantial questions concerning the constitutional rights of criminal defendants. To differing extents, each of those questions is tied to trial counsel's fundamental failure to pursue the only true issue in Johnson's trial — whether the State proved that Johnson possessed the specific intent necessary under Alabama law to convict an accomplice of capital murder. As the district court found, although there was a substantial issue of fact as to Johnson's intent (App. B, p. 145a), "counsel simply did not think much about the intent issue at all." (*Id.* at p. 123a).

A major theme of the State's brief in opposition is that trial counsel could not have litigated Johnson's intent because Johnson allegedly told them "that he was the second robber into the house and that he fired three shots at the victim" and counsel were thus constrained from "present[ing] any false testimony of the nature that he was a participant in the robbery but not in the murder." (Opposition at 3, 7).

This argument is wholly without merit. The conclusion simply does not follow from the premise. Whatever Johnson told his attorneys (Propst and DiGiulian),

they were required to put the State to its proof. *See, e.g.*, *United States* v. *Wade*, 388 U.S. 218, 257-58 (1967) (White, J., concurring in part, dissenting in part) ("Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth....[D]efense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness to be telling the truth, just as he will attempt to destroy a witness who he thinks is lying."). Indeed, trial counsel's professed strategy, as misguided as it was on the facts, was to attempt to demonstrate that the State had not proved that Johnson was present at the Cantrell home.

A defense attorney is not only permitted but obligated to exploit a failure of proof through skillful cross-examination, effective argument, and the like.[1] Counsel in this case, therefore, were required to seize upon the testimony of the only eyewitness to the crime indicating that Johnson had not been a participant in the shootout;[2] to argue

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[1] *See* American Bar Ass'n, Standards for Criminal Justice Standard 4-93 (2d ed. 1980) ("[W]here the defendant has admitted guilt to the lawyer and does not plan to testify, and the lawyer simply intends to put the state to its proof and raise a reasonable doubt, skillful cross-examination of the prosecution's witness is essential. Indeed, were counsel to forgo vigorous cross-examination of the prosecution's witnesses, counsel would violate the clear duty of zealous representation that is owed the client.")

[2] Simply ignoring the inconvenient portions of the record, the State asserts that there is no evidence to support the argument that Johnson was a third man not guilty of capital murder. As set forth in the petition (Pet. at 4), Mrs. Cantrell's testimony regarding the location of the two original intruders when Mr. Cantrell fired his last shot supports the conclusion that Johnson was not a participant in the shootout. In addition, Mrs. Cantrell testified that

other evidence that he had not been a participant; to develop evidence that more than two people had been at the crime scene, as they knew to be the case; and to argue to the judge and, if necessary, the jury that the State had failed to prove beyond a reasonable doubt that Johnson had the requisite intent.

The State does not explain how counsel could ethically rest their defense on the theory that Johnson was not even present at the scene, but could not rely on the more modest theory that he lacked the necessary intent to kill. There is no explanation. The difference between the two theories has nothing to do with legal ethics. The difference is that the argument that intent had not been proved, which trial counsel did not "think much about," may very well have appealed to a jury that voted 9 to 3 against the death penalty,[3] whereas the defense that counsel professed to pursue was bound to be rejected because the victim's bullet was found in Johnson's back. In fact, if the State were correct on the facts, Johnson's defense counsel were barred from putting on any defense at all, and Johnson no longer enjoyed the right to effective representation by counsel. That clearly is not so.

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the two intruders helped the third, wounded man (*i.e.*, Johnson) away: "Sounded like *they* were trying to help him out. I mean his feet just shuffled." (Tr. 368, emphasis added).

In any event, as the district court recognized, there was a serious question concerning Johnson's intent even setting aside the "third man" point. (App. B, p. 145a).

[3] Alabama law allows a trial judge to overrule a jury's decision that a capital murder defendant should not die. This Court has granted certiorari in *State* v. *Ring*, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 122 S. Ct. 70 U.S.L.W. 865 (U.S. 2002) (No. 01-488), to determine whether such a system is constitutional.

The State is not even correct on the facts. The record does not show that Johnson told his counsel that he intended to kill Cantrell or that only two men had entered the house. Counsel Propst's notes record that he was told that "[d]efendant pulled gun and fired twice." (*Id.* at 24). However, Propst stressed that he had not concluded that Johnson had the intent to kill Cantrell, and that Johnson did not tell him that he had fired *at* Cantrell. Propst did not know "where he fired it or in what direction." (*Id.* at 36).[4] The State was unable to match any of the bullets found at the crime scene to the gun found on Johnson when he was arrested.

More fundamentally, counsel recognized the unreliability of Johnson's account:

> Now, let me explain this to you, Judge. When I first met Keith Johnson, he was very strung out on narcotic drugs, almost to the point that his communications sometimes were garbled. And there was a good period of time that he was incapable of telling me what — you know, what he remembered about the events. (*Id.* at 26).[5]

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[4] Counsel DiGiulian did not recall whether Johnson had told him that he had fired a gun at the Cantrell residence, and his notes of his talks with Johnson did not record any such statements. (Habeas Tr. (Mar. 20, 1996) at 57).

[5] The State points to Propst's testimony that Johnson had told trial counsel "the whole story," with the apparent implication being that what he had told them somehow prevented them from addressing the exculpatory evidence relevant to the issue of intent. (Opposition at 6). Mr. Propst's mention of the "whole story," however, was a reference to the fact that he and DiGiulian were aware that the McCulloch brothers were involved in the crime, a point that counsel failed to develop at trial. (*See* R20 at 638-39).

It should be no surprise then that none of the decisions challenged by Petitioner rested on what their client had told them. (*See* Pet. at 14 n.6).

## I. PETITIONER'S *CRONIC* CLAIM

Johnson asserted that his trial counsel's failure to litigate the issue of intent constituted a failure to subject "the prosecution's case to "meaningful adversarial testing." *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). The Eleventh Circuit dismissed this claim because it concluded that *Cronic* applies only "when counsel 'entirely' fails to challenge the prosecution, and that is indisputably not so here." (App. A, p. 47a n.17). The court's opinion directly conflicts with the Sixth Circuit's decision in *Cone* v. *Bell*, 243 F.3d 961 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 663 (2001) (No. 01-400). In that case, the court held that *Cronic* applies even when defense counsel actively defended the accused at trial, and this Court recognizing a conflict among the circuits has agreed to review the Sixth Circuit's decision.

The State attempts to argue that no conflict is presented by recasting the question at issue in *Cone* as "whether counsel's conduct is such that it can be recognized as completely inappropriate in any case." (Opposition at 13). The State's recharacterization does not withstand scrutiny. This Court granted certiorari on the question whether *Cronic* applies to an alleged failure to litigate an issue critical to the outcome of the defendant's case even "where defense counsel conducts a thorough pre-trial investigation, presents lay and expert witness testimony ..., [and] conducts direct and cross examination ...." (Pet. for Cert. in *Bell* v. *Cone*, No. 01-400). The Sixth Circuit answered in the affirmative. The Eleventh Circuit has disagreed. The decision below should be reviewed along with *Bell* v. *Cone* to resolve the circuit conflict.

## II. PETITIONER'S *STRICKLAND* CLAIM

Petitioner established that there is a split among the circuits as to whether, under *Strickland* v. *Washington*, 466 U.S. 668 (1984), courts must review counsel's alleged performance errors cumulatively, with the court below following the minority position that it need not. The State inconsistently argues that this Court should not review this question because (1) both the district court and the court of appeals correctly rejected the argument that cumulative analysis is required (Opposition at 17); and (2) the Eleventh Circuit did in fact appraise trial counsel's errors in the aggregate for the purposes of its *Strickland* review. (*Id.* at 16).

The State is correct that the lower courts in this case rejected the use of cumulative analysis, and other courts have understood them to have done so. *See Leary* v. *Garraghty*, 155 F. Supp.2d 568, 577 (E.D. Va. 2001) (where the court relied on the district court's decision in this case, as well as a case from its own circuit, for the proposition that cumulative review is not to be used in analyzing counsel's performance under *Strickland*).

The State's alternative assertion that the court of appeals conducted the requisite cumulative analysis rests on the footnote dismissing Johnson's claim under *Cronic*, not *Strickland*. In fact, in the footnote, the court explicitly distinguished between claims of ineffectiveness under *Strickland*, which it had reviewed "standing alone," with the aggregated appraisal required by the *Cronic* test. (App. A, p. 47a n.17). The court rejected Petitioner's *Cronic* claim on the grounds described above. It was only by failing to address the cumulative impact of counsel's errors that the Eleventh Circuit was able to avoid confronting Johnson's basic claim that the key issue of intent was not meaningfully presented to the jury.

The State asserts that Petitioner did not squarely present this issue to the court of appeals. (Opposition at 16). However, as the State itself recognizes, Petitioner asserted that the court was required to view trial counsel's alleged errors "in the aggregate." (*Id.*) The very next sentence of Petitioner's brief stressed that: "Counsel's mistakes so infected the trial that the prosecution's flimsy case on intent effectively went unchallenged...." (Pet. Eleventh Cir. Br. at 23-24); (*see also id.* at 24-28) (discussion under the heading "Trial Counsel Ignored the State's Failure to Prove Specific Intent").[6] That is precisely what Petitioner argues here. The Eleventh Circuit rejected the contention, concluding that, under *Strickland*, alleged performance errors were to be analyzed "standing alone." (App. A, p. 47a n.17).

## III. PETITIONER'S *BECK* CLAIM

The Court below rejected Petitioner's claim that, under *Beck* v. *Alabama*, 447 U.S. 626 (1981), and *Schad* v. *Arizona*, 501 U.S. 624 (1991), he was entitled to a felony murder charge on the ground that "[a] felony murder instruction would not have changed the standard for conviction on capital murder, and so for an objective and rational jury — and we must presume that this was such a jury — an instruction on that offense should not have changed the outcome." (App. A, p. 39a).

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[6] The State also asserts that in the court below Petitioner relied on Eleventh Circuit precedent for the proposition that that cumulative analysis is required under *Strickland*'s performance prong. (Opposition at 16 n.7). To the contrary, the precedent was cited for the separate point that, under *Strickland*, a court must "assess *prejudice* by aggregating the errors at each stage of trial." (Pet. Eleventh Cir. Br. at 23 n.14) (emphasis added).

The State makes no attempt to explain how the court of appeals' reliance on the "presumption of a rational jury" is consistent with *Beck*'s and *Schad*'s holdings that a capital defendant is entitled to have the jury instructed on a lesser-included offense that "makes sense" in the light of the record. (*See* Pet. at 23-24). The State instead asserts that Johnson did not raise this issue as a question of due process in the courts below, but rather only as an aspect of his ineffective assistance of counsel claim. That is incorrect. Johnson has consistently raised the issue separately from his ineffective-assistance claim. (*See* Pet. Br. in Ala. Ct. Crim. App. at 24; Pet. Br. in Ala. Sup. Ct. at 34; Pet. District Court Opening Br. at 34; Pet. Eleventh Cir. Br. at 28; Pet. Eleventh Cir. Petition for Rehearing at 14).[7]

In any event, whether viewed as a question of due process or ineffective assistance, the fundamental issue is the same. Was Johnson deprived of a felony murder charge to which he was constitutionally entitled as a viable alternative to capital murder?

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[7] The Eleventh Circuit panel appears to have mistakenly concluded that Johnson was not asserting that the failure to give a felony murder charge constituted a violation of his due process rights. (App. A, p. 38a, "[W]e focus not on whether there was a Due Process violation, but rather whether the failure of Johnson's trial attorneys' failure to ask for a felony murder instruction amounted to *Strickland* performance error and prejudice."). As Petitioner made clear in his petition for rehearing, he intended to raise the failure as an issue separate from the ineffective-assistance claim. (*See* Pet. Eleventh Cir. Petition for Rehearing at 14, citing Pet. Eleventh Cir. Br. at 28, "Johnson was constitutionally entitled to a felony murder charge in order to give the jury a realistic third option between conviction for capital murder and acquittal.").

## IV. PETITIONER'S *BRADY* CLAIM

The State asserts that it was not required to turn over to the defense an Alabama Bureau of Investigation ("ABI") report which noted that Garland and Wayne McCulloch "did the shooting" because the report "only discloses information that the jury already knew, that others were involved." (Opposition at 23). The report obviously says more than that others were there. It says that two men other than Johnson "did the shooting." Further, the jury was never told that there had been more than two men at the crime scene. The entire trial was allowed to proceed on the State's "main argument" that, because only two men had been present and Johnson had been present, Johnson had to have been one of the two participants in the shooting. (App. A, at pp. 18a-19a). The ABI report would have helped to establish that more than two people were present at the Cantrell home, and thus that proof of Johnson's presence was not proof of his guilt of capital murder.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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